Supreme Court, U.S.
FILED

No. 02-1541

APR 18 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

STATE OF IOWA,

Petitioner,

vs.

FELIPE EDGARDO TOVAR,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR A WRIT OF CERTIORARI

THOMAS J. MILLER
Attorney General of Iowa

*DOUGLAS R. MAREK
Deputy Attorney General

DARREL MULLINS
Assistant Attorney General
Hoover Bldg., 2nd Floor
Des Moines, Iowa 50319
515/281-5976

Attorneys for Petitioner
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

73 pp

QUESTION PRESENTED FOR REVIEW

Does the Sixth Amendment require a court to give a rigid and detailed admonishment to a *pro se* defendant pleading guilty of the usefulness of an attorney, that an attorney may provide an independent opinion whether it is wise to plead guilty and that without an attorney the defendant risks overlooking a defense?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Authorities	iv
Lower Court Decisions	1
Jurisdiction	1
Constitutional and Statutory Provisions	2
Statement of the Case	5
The Plea Court And Ruling On Waiver Of Counsel	5
The Iowa Court Of Appeals And *Patterson v. Illinois*	8
The Iowa Supreme Court And *United States v. Akins*	9
Adverse Impact Of The State Supreme Court Decision	11
Reasons for Granting the Petition for Certiorari	12
The Supreme Court Should Decide The Important, Unresolved Federal Question Of The Requirements For A Valid Waiver Of Counsel At A Guilty Plea. Nineteen State Courts And Federal Circuits Have Split Over The Issue. The Iowa Supreme Court's Decision Provides Detailed Reasoning And Stands On An Uncontested, Fully Developed Record	12
A. The Supreme Court Has Not Decided The Issue	12
B. Nineteen State And Federal Courts Have Split Over The Issue	14
The Iowa Court Relied On A Minority Circuit Position	16

TABLE OF CONTENTS – Continued

	Page
Commentators Compound The Uncertainty Over The Issue	19
C. The Iowa Supreme Court's Erroneous Decision Is Suitable For Review	21
Conclusion	24

TABLE OF AUTHORITIES

Page

CASES

Adams v. United States ex rel. McCann, 317 U.S. 269 (1942) 21

Aiken v. United States, 296 F.2d 604 (4th Cir. 1961) 17

Boyd v. Dutton, 405 U.S. 1 (1972) 13

Brady v. United States, 397 U.S. 742 (1970) 22

Commonwealth v. Payson, 723 A.2d 695 (Pa. Super. Ct. 1999) 16

Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) 2

Custis v. United States, 511 U.S. 485 (1994) 22

Day v. United States, 357 F.2d 907 (7th Cir. 1966) 17, 18

Faretta v. California, 422 U.S. 806 (1975) 12, 13, 16, 17, 19

In re Johnson, 398 P.2d 420 (Cal. 1965) 14, 15, 23

Johnson v. State, 614 S.W.2d 116 (Tex. Ct. Crim. App. 1981) 14, 15

Michigan v. Long, 463 U.S. 1032 (1983) 2

Molignaro v. Smith, 408 F.2d 795 (5th Cir. 1969) 17, 18

Nichols v. United States, 511 U.S. 738 (1994) 14

Patterson v. Illinois, 487 U.S. 285 (1988) 9, 12, 13, 23

People v. Dunn, 158 N.W.2d 404 (Mich. 1968) 12, 14

People v. Torres, 96 Cal. App. 3d 14 (Cal. Ct. App. 1979) 15

State v. Cashman, 491 N.W.2d 462 (S.D. 1992) 8, 14, 15, 16

State v. Finstad, 866 S.W.2d 815 (Tex. Ct. App. 1993) 16

State v. Green, 178 N.W.2d 271 (Neb. 1970) 14

TABLE OF AUTHORITIES – Continued

Page

State v. Louthan, 595 N.W.2d 917 (Neb. 1999) 15

State v. Maxey, 873 P.2d 150 (Idaho 1994) 14, 15

State v. Rater, 568 N.W.2d 655 (Iowa 1997) 15

State v. Rubin, 409 N.W.2d 504 (Minn. 1987) 16

State v. Strain, 585 So.2d 540 (La. 1991) 14, 15

State v. Tovar, 656 N.W.2d 112 (Iowa 2003) 1, 22, 23

Stano v. Dugger, 921 F.2d 1125 (11th Cir. 1991) 18

Swensen v. Municipality of Anchorage, 616 P.2d 874 (Alaska 1980) 16

United States v. Akins, 276 F.3d 1141 (9th Cir. 2002) 10, 16, 17

United States v. Fuller, 941 F.2d 993 (9th Cir. 1991) 17

United States v. Gallop, 838 F.2d 105 (4th Cir. 1988) 17, 18

United States v. Gillings, 568 F.2d 1307 (9th Cir. 1978) 17

United States ex rel. McDonald v. Commonwealth of Pennsylvania, 343 F.2d 447 (3rd Cir. 1965) 17

United States ex rel. Miner v. Erickson, 428 F.2d 623 (8th Cir. 1970) 17

United States v. Miller, 910 F.2d 1321 (6th Cir. 1990) 17, 19

United States v. Ruiz, 536 U.S. ___, 122 S.Ct. 2450 (2002) 22

Von Moltke v. Gillies, 332 U.S. 708 (1948) 13, 17, 18, 19, 20

Watts v. State, 556 S.E.2d 368 (S.C. 2001) 16

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

United States Constitution, Amendment 6 ..... *passim*
28 U.S.C. § 1257(a) 2
28 U.S.C. § 2102 2
28 U.S.C. § 2254(d)(1) (2003) 11
Iowa Code § 123.46 (2003) 11
Iowa Code § 123.91 (2003) 11
Iowa Code § 124.401 (2003) 11
Iowa Code § 124.411 (2003) 11
Iowa Code § 321J.2 (2001) 1, 3
Iowa Code § 321J.2(2)(c) (2001) 5
Iowa Code § 321.561 (2001) 1, 5
Iowa Code § 708.2A (2003) 11
Iowa Code § 708.7 (2003) 11
Iowa Code § 708.11 (2003) 11
Iowa Code § 709.11 (2003) 11
Iowa Code § 713.6A(2) (2003) 11
Iowa Code § 822.2(1) (2003) 11
Iowa Code § 902.8 (2003) 11
Iowa R. Crim. P. 2.8(2)(b) 3, 9
Unif. R. Crim. P. 711(a) 21
Unif. R. Crim. P. 711(b) 21

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

ABA Standards for Criminal Justice, *Providing Defense Services* Std. 5-8.2 Commentary (3rd ed. 1992) 20
ABA Standards for Criminal Justice, *Providing Defense Services* Std. 5-8.2(b) (3rd ed. 1992) 20
ABA Standards for Criminal Justice, *Providing Defense Services* Std. 6-3.6 (2nd ed. 1980) 20
Benchbook for U.S. District Court Judges § 2.01 (4th ed. March 2000 rev.) 20
Sourcebook of Criminal Justice Statistics 2001 11
10 U.L.A. 193 (2001) 21
William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 Va. L. Rev. 761 (1989) 12
Wis. Jury Instruction – Criminal Special Materials 30 16
3 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 11.3(b) (2nd ed. 1999) ... 13, 19
5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 21.3(a) (2nd ed. 1999) 12, 19

LOWER COURT DECISIONS

The Johnson County, Iowa District Court denied Defendant Felipe Edgardo Tovar's Application for Adjudication of Law Points on May 14, 2001. (App. 37). On May 25, 2001, the district court conducted a stipulated bench trial and convicted Tovar of Third Offense Operating While Intoxicated (OWI) and Driving While Barred. Iowa Code §§ 321J.2, 321.561 (2001). (App. 34).

Tovar appealed and the Iowa Court of Appeals affirmed his conviction on June 19, 2002. (App. 30).

Tovar sought further review, which the Iowa Supreme Court granted on September 20, 2002 and set the case for consideration without oral argument. (App. 31).

On January 23, 2003, the Iowa Supreme Court issued the opinion from which the State of Iowa now appeals, *State v. Tovar*, 656 N.W.2d 112 (Iowa 2003). (App. 1).

JURISDICTION

The Iowa Supreme Court held that the Sixth Amendment prevents use of a prior conviction for enhancement purposes if the trial court at the plea on the prior conviction had not advised the *pro se* defendant of three things: (1) that an attorney can be useful and that there are disadvantages in proceeding without counsel; (2) that there are defenses which might not be known to laypersons, and the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked; and (3) that by waiving the right to counsel, defendant loses the opportunity to obtain an independent opinion on whether, under the facts and

applicable law, it is wise to plead guilty. The court vacated the earlier decision of the Iowa Court of Appeals, reversed the judgment of the Johnson County District Court and remanded for entry of judgment without enhancement by Tovar's prior OWI conviction.

The Iowa Supreme Court's opinion presents a federal issue and is a final judgment for purposes of this Petition. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 478-80 (1975). The Iowa Supreme Court's opinion rests solely on the Sixth Amendment right to counsel and not on any adequate and independent state ground. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

This Court now has jurisdiction. 28 U.S.C. §§ 1257(a), 2102.

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. United States Constitution, Amendment 6.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

II. Iowa Code § 321J.2 (2001).

> 1. A person commits the offense of operating while intoxicated if the person operates a motor vehicle in this state in any of the following conditions:
>
> a. While under the influence of an alcoholic beverage or other drug or combination of such substances.
>
> b. While having an alcohol concentration of .10 or more.
>
> * * *
>
> 2. A person who violates subsection 1 commits:
>
> a. A serious misdemeanor for the first offense, punishable by all of the following:
>
> (1) Imprisonment in the county jail for not less than forty-eight hours. . . .
>
> * * *
>
> b. An aggravated misdemeanor for a second offense, and shall be imprisoned in the county jail . . . not less than seven days. . . .
>
> c. A class "D" felony for a third offense and each subsequent offense, and shall be imprisoned in the county jail for a determinate sentence of not more than one year but not less than thirty days, or committed to the director of the department of corrections. . . .

III. Iowa Rule of Criminal Procedure 2.8(2)(b)

> *Pleas of guilty*. The court may refuse to accept a plea of guilty, and shall not accept a plea of guilty

without first determining that the plea is made voluntarily and intelligently and has a factual basis. Before accepting a plea of guilty, the court must address the defendant personally in open court and inform the defendant of, and determine the defendant understands, the following:

(1) The nature of the charge to which the plea is offered.

(2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered.

(3) That a criminal conviction, deferred judgment, or deferred sentence may affect a defendant's status under federal immigration laws.

(4) That the defendant has the right to be tried by a jury, and at trial has the right to assistance of counsel, the right to confront and cross-examine witnesses against the defendant, the right not to be compelled to incriminate oneself, and the right to present witnesses in the defendant's own behalf and to have compulsory process in securing their attendance.

(5) That if the defendant pleads guilty there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial.

The court may, in its discretion and with the approval of the defendant, waive the above procedures in a plea of guilty to a serious or aggravated misdemeanor.

STATEMENT OF THE CASE

The Plea Court And Ruling On Waiver Of Counsel

The Johnson County Attorney charged Felipe Edgardo Tovar on December 14, 2001 with operating while intoxicated as a third offense and with driving while license barred. Iowa Code §§ 321J.2(2)(c), 321.561 (2001). (App. 38-39). Tovar applied for an adjudication of law points, contending that an OWI conviction from 1996 in Story County, Iowa, could not be used to enhance his present offense from OWI 2nd to OWI 3rd because the record did not show he knowingly, voluntarily and intelligently waived his right to counsel before pleading guilty. (App. 2-3). Tovar claimed the district court neglected to discuss, among other things, an admonishment of the usefulness of an attorney. (App. 27).

At Tovar's 1996 arraignment in Story County, the following colloquy took place:

> THE COURT: Mr. Tovar appears without counsel and I see, Mr. Tovar, that you waived application for a court appointed attorney. Did you want to represent yourself at today's hearing?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And are you charged in your true and correct name?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And did you want me to read that information to you or did you want to waive the reading?
>
> THE DEFENDANT: Waive the reading.

THE COURT: And how do you wish to plead?

THE DEFENDANT: Guilty.

* * *

THE COURT: Mr. Tovar, your age?

THE DEFENDANT: Twenty-one.

THE COURT: Your education?

THE DEFENDANT: Currently in college.

THE COURT: So you, of course, read and write the English language?

THE DEFENDANT: Yes.

* * *

THE COURT: . . . [I]f you continue with this desire to plead guilty, there are certain rights that each one of you will be giving up and I now will explain those rights to you. First of all, if you enter a plea of not guilty, you would be entitled to a speedy and a public trial by jury. But, if you plead guilty, you give up your right to have a trial of any kind on your charge. Do you understand that . . . Mr. Tovar?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: If you would enter a plea of not guilty, not only would you have a right to a trial, you would have a right to be represented by an attorney at that trial, including a court appointed attorney. That attorney could help you select a jury, question and cross-examine the State's witnesses, present evidence, if any, in your behalf, and make arguments to the judge

and jury on your behalf. But, if you plead guilty, not only do you give up your right to a trial, you give up your right to be represented by an attorney at that trial. Do you understand that . . . Mr. Tovar?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: Mr. Tovar . . . you have been charged with operating while intoxicated. That charge carries a maximum penalty of up to a year in jail and up to a $1000.00 fine and the mandatory minimum fine [sic] of two days in jail and a $500.00 fine. Do you understand that, Mr. Tovar?

THE DEFENDANT: Yes, sir.

(App. 24-26).

The sentencing court conducted nearly the same colloquy. Before pronouncing sentence, the court asked the following:

> THE COURT: Mr. Tovar, I note that you are appearing here today without having an attorney present and you waived application for a court appointed attorney. I am sorry. You applied, but it was denied due to the fact you are dependent upon your parents. Mr. Tovar, did you want to represent yourself at today's hearing or did you want to take some time to hire an attorney to represent you?
>
> THE DEFENDANT: No, I will represent myself.
>
> THE COURT: Mr. Tovar, has anyone promised you anything or threatened you in any way in

order to convince you to proceed here today without having an attorney present?

THE DEFENDANT: No, sir.

(App. 26-27). The court then sentenced Tovar to a brief period in the county jail. (App. 7).

Upon review of these transcripts, the Johnson County District Court in 2001 denied Tovar's motion to adjudicate law points, noting:

> The degree of inquiry necessary to assure a valid waiver varies with the nature of the offense and the ability of the defendant to understand the process. Where the offense is readily understood by laypersons and the penalty is not unduly severe, the duty of inquiry which is imposed upon the court is only that which is required to assure an awareness of [the] right to counsel and a willingness to proceed without counsel in the face of such awareness.

(App. 36-37). (citations omitted)

The Iowa Court Of Appeals And *Patterson v. Illinois*

Tovar appealed and the Iowa Court of Appeals affirmed. Relying on *State v. Cashman*, 491 N.W.2d 462, 465 (S.D. 1992), the Iowa Court of Appeals observed:

> [T]he appropriate test for waiver [of counsel] prior to a guilty plea proceeding is "whether the accused was made sufficiently aware of his right to have counsel present; and whether the accused was made sufficiently aware of the possible consequences of a decision to forego the aid of counsel."

Quoting *Patterson v. Illinois*, 487 U.S. 285, 292-93 (1988). (App. 29). Applying this test, the Court of Appeals concluded Tovar validly waived his right to counsel because the court advised him of his right to have counsel present and informed him of the ultimate adverse consequences of his guilty plea, namely the maximum possible punishment for his offense. (App. 29-30).

The Iowa Supreme Court And *United States v. Akins*

The Iowa Supreme Court granted Tovar's request for further review and set the matter for consideration without oral argument. (App. 31). In a 4-3 decision, the Iowa Supreme Court vacated the Iowa Court of Appeals' decision, reversed the district court and remanded the case for entry of judgment without considering Tovar's 1996 OWI conviction. (App. 19).

The Iowa Supreme Court recognized that the requirements for a valid waiver of the right to counsel at a guilty plea hearing "are subject to some dispute." (App. 9).

The Iowa Supreme Court rejected the proposition that a valid guilty plea colloquy required by Iowa Rule of Criminal Procedure 2.8(2)(b) adequately conveys to a defendant the danger of continuing without counsel. (App. 10-11). Moreover, the court stated:

> Although a layperson can readily understand what it means to drive while intoxicated, he or she will most likely be unaware of the prerequisites for invoking implied consent and the other statutory and constitutional restrictions on police action that might provide a basis for suppression

of the evidence of intoxication, which is usually the only meaningful defense available.

(App. 15).

Relying on Ninth Circuit precedent, the Iowa Supreme Court held that a plea court must advise a defendant pleading guilty *pro se*: (1) of the usefulness of an attorney and the dangers of self-representation; (2) that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense may be overlooked (although "the court is not expected . . . [to discuss] with the defendant the various defenses"); and (3) that by waiving the right to an attorney, the defendant will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. *See United States v. Akins*, 276 F.3d 1141, 1148 (9th Cir. 2002). (App. 18).

The three dissenting justices stated the majority opinion "is an extreme measure that unnecessarily depreciates the consequences of a criminal conviction based on defendant's solemn confession of guilt in open court." (App. 19). The dissent observed the opinion was "not pragmatic in any sense," but a "rigid standard." (App. 20). Tovar was aware of his right to have counsel present and "fully aware of the penal consequences that might befall him if he went forward without counsel and pleaded guilty." (App. 21). Unidentified potential defenses that an able lawyer might advance amounted to "speculation." (App. 21).

Adverse Impact Of The State Supreme Court Decision

The Iowa Supreme Court's decision has a broad and deep impact on Iowa law. The reasoning inhibits the guilty plea process which forms the bulk of criminal case dispositions here and elsewhere. Guilty pleas accounted for disposition of 64,402 cases in United States District Courts in 2001 and 872,001 felony dispositions in state courts in 1998, or 85% and 94% of dispositions, respectively. *Sourcebook of Criminal Justice Statistics 2001*, pp. 445, 419.

Like many other states, Iowa has numerous offenses for which the penalties increase based on earlier convictions. *See, e.g.*, Iowa Code §§ 123.46, 123.91 (public intoxication enhancement); §§ 124.401, 124.411 (controlled substance possession); § 708.2A (domestic abuse assaults); § 708.7 (harassment); § 708.11 (stalking); § 709.11 (sexual assault); § 713.6A(2) (burglary); § 902.8 (habitual offender sentencing enhancement) (2003).

If left to stand, this decision allows defendants to challenge *any* guilty plea, prior or current, entered without an attorney. 28 U.S.C. § 2254(d)(1) (2003) (allowing writ of habeas corpus where decision is contrary to federal law); Iowa Code § 822.2(1) (allowing post-conviction relief where the conviction violated the State or Federal constitution).

For the future, prosecuting attorneys in Iowa must reduce charges for second, third and subsequent offenses to a lesser offense when faced with the practical difficulty of obtaining aged transcripts and filings in otherwise settled convictions. Even if such records are found, it is not

likely any court would have followed the colloquy crafted by the *Tovar* majority.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

THE SUPREME COURT SHOULD DECIDE THE IMPORTANT, UNRESOLVED FEDERAL QUESTION OF THE REQUIREMENTS FOR A VALID WAIVER OF COUNSEL AT A GUILTY PLEA. NINETEEN STATE COURTS AND FEDERAL CIRCUITS HAVE SPLIT OVER THE ISSUE AND THE IOWA SUPREME COURT'S DECISION PROVIDES DETAILED REASONING AND STANDS ON AN UNCONTESTED, FULLY DEVELOPED RECORD.

A. The Supreme Court Has Not Decided The Issue.

The Supreme Court has not specifically addressed the requirements for waiver of counsel at a guilty plea in a State prosecution. *See People v. Dunn*, 158 N.W.2d 404, 407 (Mich. 1968); 5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 21.3(a), at 113 (2nd ed. 1999); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 Va. L. Rev. 761, 826 (1989).

This case falls, conceptually, within a gap between waiver of counsel at post-indictment questioning and waiver of counsel at trial. *Compare Patterson*, 487 U.S. at 298 *with Faretta v. California*, 422 U.S. 806, 835-36 (1975).

At one end, post-indictment questioning, *Miranda* warnings sufficiently apprise a defendant of his right to counsel and the consequences of proceeding alone. *Patterson*, 487 U.S. at 298. At the other end, waiver of counsel for a *trial*, a much more searching inquiry is necessary,

including an advisory of the dangers and disadvantages of proceeding without counsel to trial. *Faretta*, 422 U.S. at 835-36.

Well before *Faretta* or *Patterson*, a plurality of this Court touched on the waiver of counsel in the broader context of a voluntary guilty plea. *Von Moltke v. Gillies*, 332 U.S. 708 (1948). There, defendant pleaded guilty after a protracted failure to secure or be allowed to speak with counsel. *Von Moltke*, 332 U.S. at 713-15. Justice Black, speaking for the plurality, stated:

> To be valid such a waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defense to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Id. at 724.

As discussed in the section below, lower courts either follow *Patterson's* instruction for courts to take a "pragmatic" approach to waivers of counsel, or the *Von Moltke* plurality's expression of the necessary components of a guilty plea colloquy, or an approach not countenanced by either decision. *See* 3 LaFave, Israel & King, *Criminal Procedure* § 11.3(b), at 542, 545-46.

The nearest opportunity this court has had to directly address the issue arose roughly thirty years ago in *Boyd v. Dutton*, 405 U.S. 1 (1972). There, no transcript of the plea or sentencing existed. *Boyd*, 405 U.S. at 1. Since the record was virtually empty, the court remanded the matter for an evidentiary hearing. *Id.* at 2-3.

Nichols v. United States provided an opportunity to discuss the issue, but the Court eschewed doing so because it held the right to counsel never attached in the first place. 511 U.S. 738, 741 fn. 4 (1994).

This court should inform the state and federal courts what minimum requirements the Sixth Amendment sets for waiver of counsel at a guilty plea.

B. Nineteen State And Federal Courts Have Split Over The Issue.

A majority of states which have considered the question have held the Sixth Amendment requires no more of a plea court than an advisory that defendant is entitled to counsel and information bearing on the consequences of pleading guilty, including the maximum and minimum sentence, as well as the nature of the charges, the right to trial by jury, proof beyond a reasonable doubt, subpoena powers, the right to confront witnesses, the right to testify, the right against self-incrimination, whether there was a plea agreement (and, if so, its terms) and the right to appeal. *See In re Johnson*, 398 P.2d 420, 427 (Cal. 1965); *State v. Maxey*, 873 P.2d 150, 154 (Idaho 1994); *State v. Strain*, 585 So.2d 540, 543-44 (La. 1991); *Dunn*, 158 N.W.2d at 407; *State v. Green*, 178 N.W.2d 271, 272-73 (Neb. 1970); *Cashman*, 491 N.W.2d at 465-66; *Johnson v. State*, 614 S.W.2d 116, 119-20 (Tex. Ct. Crim. App. 1981).

These cases stress that laypersons can easily grasp the guilty plea procedure and the pitfalls of self-representation without further advisories. *See, e.g., Maxey*, 873 P.2d at 154; *Strain*, 585 So.2d at 544; *Cashman*, 491 N.W.2d at 465.

In addition to guilty plea proceedings being comprehensible by the lay public, numerous states have concluded the elements of drunk driving, specifically, are self-explanatory. *See, e.g., Maxey*, 873 P.2d at 154; *State v. Rater*, 568 N.W.2d 655, 660 (Iowa 1997); *Strain*, 585 So.2d at 544.

California has noted the needless practical difficulties associated with more extensive procedures for *pro se* guilty pleas to simple offenses, especially, the "unending stream of traffic violations, drunk cases, vagrancies, and similar petty offenses." *In re Johnson*, 398 P.2d at 427.

> [P]robably the vast majority of citizens haled into court on traffic violations share the judge's interest in prompt disposition of their cases, feeling themselves sufficiently inconvenienced by having to make personal appearances in the first place. To require a judge to orally examine each such defendant at length for the purpose of determining his capability of defending himself would seem to be an idle and time-wasting ritual.

Id. Therefore, for simple and lightly punished crimes, a California judge need not advise a defendant that self-representation is unwise. *People v. Torres*, 96 Cal. App. 3d 14, 19 (Cal. Ct. App. 1979).

Generally, these courts hold the Sixth Amendment does not require courts to advise defendants of the pitfalls of self-representation where the court advises of the right to counsel and defendant enters an otherwise valid plea. *Strain*, 585 So.2d at 543-44; *Cashman*, 491 N.W.2d at 465; *Johnson*, 614 S.W.2d at 119-20. Drunk driving convictions in particular entered following a *pro se* guilty plea may therefore enhance a later offense in these states. *Maxey*, 873 P.2d at 156; *Strain*, 585 So.2d at 544; *State v. Louthan*,

595 N.W.2d 917, 926 (Neb. 1999); *Cashman*, 491 N.W.2d at 465-66; *State v. Finstad*, 866 S.W.2d 815, 817 (Tex. Ct. App. 1993).

Other jurisdictions insist the Sixth Amendment mandates a qualitatively different approach to waivers of counsel during a guilty plea. *See Swensen v. Municipality of Anchorage*, 616 P.2d 874, 877-78 (Alaska 1980); *State v. Rubin*, 409 N.W.2d 504, 506 (Minn. 1987); *Commonwealth v. Payson*, 723 A.2d 695, 703 (Pa. Super. Ct. 1999); *Watts v. State*, 556 S.E.2d 368, 371 (S.C. 2001). These states either require a full *Faretta* colloquy, *Watts*, 556 S.E.2d at 371 and *Payson*, 723 A.2d at 703, or an explanation of the advantages of counsel, *Swensen*, 616 P.2d at 877.

By court rule, Minnesota takes the most extreme position requiring counsel to advise the defendant on the waiver of counsel. *Rubin*, 409 N.W.2d at 506. Wisconsin encourages courts to alert the defendant that a lawyer may assist in ways he or she might not expect. Wis. Jury Instruction – Criminal Special Materials 30 at 5-6.

So long as this patchwork of rules exists, valid convictions in some states will not receive full force and effect in other states.

The Iowa Court Relied On A Minority Circuit Position

The Iowa Supreme Court relied on the Ninth Circuit decision in *United States v. Akins*, 276 F.3d 1141 (9th Cir. 2002). *Akins* itself emanates from a series of decisions within the Circuit and holds that even with a complete advisory of the right to counsel and the consequences of a conviction, *Faretta* requires a greater discussion of the

dangers and disadvantages of self-representation at a guilty plea. *Id.* at 1146-47; *see also United States v. Fuller*, 941 F.2d 993, 995-96 (9th Cir. 1991) (holding "the accused must appreciate the possible consequences of mishandling the case and must be aware that a lawyer's experience and professional training may be of great benefit"); *United States v. Gillings*, 568 F.2d 1307, 1308-09 (9th Cir. 1978) (holding *Faretta* applies to waiver of counsel at guilty plea, that defendant must understand the charges and "the manner in which an attorney can be of assistance"). The *Akins* court believed that even if a defendant believed he was "'guilty' in a layman's sense" he might be unaware of the technical rules surrounding the charge and thus the Sixth Amendment would not allow his conviction to stand. *Id.* at 1148.

The Ninth Circuit also relied on the Third Circuit's expressed view that a layperson lacks the ability to comprehend a guilty plea proceeding. *United States ex rel. McDonald v. Commonwealth of Pennsylvania*, 343 F.2d 447, 451 (3rd Cir. 1965). The *McDonald* holding does not, however, go so far as the Ninth Circuit. Rather, the Third Circuit equates the requirements for waiver of counsel with the constitutional mandate for a voluntary and intelligent guilty plea itself. *Id.* citing *Von Moltke*, 332 U.S. at 724.

The Fourth, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits take a different approach. *See United States v. Gallop*, 838 F.2d 105, 110 (4th Cir. 1988); *Aiken v. United States*, 296 F.2d 604, 607 (4th Cir. 1961); *Molignaro v. Smith*, 408 F.2d 795, 799 (5th Cir. 1969); *United States v. Miller*, 910 F.2d 1321, 1325 (6th Cir. 1990); *Day v. United States*, 357 F.2d 907, 910 (7th Cir. 1966); *United States ex rel. Miner v. Erickson*, 428 F.2d 623, 627-28 (8th

Cir. 1970); *Stano v. Dugger*, 921 F.2d 1125, 1145 (11th Cir. 1991). These Circuits have recognized a variety of considerations play into both the constitutionality of waiver and the reversible nature of error, if any.

The Fourth Circuit recognizes the majority of circuits do not follow a "formalistic, deliberate and searching inquiry," but rather that "[a]t a minimum the district court should, before permitting an accused to waive his right to counsel, explain the charges and punishments." *Gallop*, 838 F.2d at 110. The failure to do so does not require reversal where, for example, the defendant rejects counsel for the purpose of delaying trial. *Id.* at 110-11.

Similar to the Fourth Circuit, the Fifth Circuit has said that at a minimum, a court must:

> (1) explain the charges and the possible punishment, (2) inquire whether any threats or pressures have been brought to bear on him, and (3) determine whether any promises have been made to him by the investigating or prosecuting officials.

Molignaro, 408 F.2d at 800. *Molignaro*, like the Seventh Circuit's *Day* decision, instructs generally that a court should discuss with defendant the *Von Moltke* plurality factors: apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments, possible defenses to the charges and circumstances in mitigation, and all other facts essential to a broad understanding of the whole matter. *Id.*; *Day*, 357 U.S. at 910.

The Sixth Circuit holds that a valid waiver of counsel occurs where the accused is informed of the right to

counsel and the maximum possible penalty. *Miller*, 910 F.2d at 1324-25, fn. 3.

In sum, although a split exists, the majority of Circuits understands that awareness of the right to counsel at a guilty plea and knowledge of the maximum possible penalties for conviction ensures a valid waiver of counsel. Nevertheless, because of the split, convictions in the majority of federal courts will not be valid for enhancement purposes in the Third or Ninth Circuits or many states.

Commentators Compound The Uncertainty Over The Issue

Secondary sources also offer conflicting views of the required practice for waiver of counsel at a guilty plea. One source presumes that *Faretta* applies to the guilty plea context, but notes the matter "is not beyond dispute" because some of that decision's reasoning applies only to the trial setting. 5 LaFave, Israel & King, *Criminal Procedure* § 21.3(a), at 113, fn. 22.

Even so, this source posits that in the trial context, lower courts have "generally rejected the view 'that a waiver, to be [constitutionally] valid, must emerge from a colloquy between trial judge and defendant covering every factor specified by Justice Black'" in the *Von Moltke* decision. 3 LaFave, Israel & King, *Criminal Procedure* § 11.3(b), at 542, 545-46. The commentator states, nevertheless, that courts should employ "an especially careful procedure in a guilty plea context because of defendant's likely ignorance of what assistance of counsel can provide even if there will be no trial." 5 LaFave, Israel & King, *Criminal Procedure* § 21.3(a), at 113.

The *Benchbook for U.S. District Court Judges* effectively instructs federal courts to conduct a *Faretta* colloquy with defendants pleading guilty. *Benchbook for U.S. District Court Judges* § 2.01 fn. 1 (4th ed. March 2000 rev.). This general colloquy discusses the defendant's understanding that the rules of evidence and criminal procedure apply and admonishes the defendant:

> I must advise you that in my opinion a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself.

Id. § 1.02, p. 5.

The American Bar Association has authored the most aggressive source on the subject. ABA Standards for Criminal Justice, *Providing Defense Services* Std. 5-8.2(b), p. 102-06 (3rd ed. 1992); *compare id.* Std. 6-3.6 (2nd ed. 1980). The ABA would require provision of counsel for both misdemeanor and felony prosecutions and "[n]o waiver should be accepted unless the accused has at least once conferred with a lawyer." *Id.* Std. 5-8.2(b), p. 102. The ABA bases its standards upon a reading of *Von Moltke* and the notion that "[a]n accused who expresses a desire to proceed without counsel may sometimes fail to understand fully the assistance a lawyer can provide." *Id.* Std. 5-8.2 Commentary, p. 104-05.

The National Conference of Commissioners on Uniform State Laws has taken the ABA's position, requiring a court to satisfy itself that the defendant:

> fully understands . . . that a defense lawyer can render important assistance . . . in the event of a plea, in consulting with the prosecuting attorney as to the possible reduced charges or lesser penalties, and in presenting to the court matters that might lead to a lesser penalty.

Unif. R. Crim. P. 711(a), 10 U.L.A. 193 (2001).

Moreover, in the Conference's view, in a misdemeanor case a court should – and in a felony case, must – "refuse to accept a waiver of counsel unless a lawyer consults with the defendant before the defendant waives counsel." *Id.* 711(b). This, incidentally, runs counter to this Court's statement that the Sixth Amendment does not *require* the opinion of a lawyer before pleading guilty. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277 (1942). "Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice." *Id.*

C. The Iowa Supreme Court's Erroneous Decision Is Suitable For Review.

The Iowa Supreme Court's decision propagates the Ninth Circuit's minority view of the Sixth Amendment. The decision does, however, provide detailed reasoning and rests upon an uncontested, complete factual record which will facilitate Supreme Court review.

No judicial view requires as extensive or intrusive a colloquy as the Iowa Supreme Court. Iowa now requires, at a minimum, that a district court perform a unique inquiry: 1) advise the defendant – and presumably ensure understanding of – "the usefulness of an attorney and the dangers of self-representation;" 2) "advise the defendant

generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked;" and 3) admonish the defendant that "by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty." *Tovar*, 656 N.W.2d at 121 (App. 18-19).

To be sure, this Court has recognized the special importance of the right to counsel. *See Custis v. United States*, 511 U.S. 485, 494-95 (1994); *Brady v. United States*, 397 U.S. 742, 748, fn. 6 (1970).

On the other hand, the Iowa Supreme Court does not heed this Court's observation that the Constitution "does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." *United States v. Ruiz*, 536 U.S. ___, ___, 122 S.Ct. 2450, 2456 (2002).

Neither does the Iowa Supreme Court majority give credence to this Court's recognition that the validity of a waiver of counsel has pragmatic components, including promoting the finality of judgments and the difficulty of obtaining aged records from other jurisdictions. *Custis*, 511 U.S. at 496.

Requiring a discussion of the benefits of an independent legal opinion or the other matters required by the Iowa Supreme Court needlessly prolongs the plea process. *See Ruiz*, 536 U.S. at ___, 122 S.Ct. at 2457 (requiring the Government to provide information related to possible

defenses prior to "fast-track" plea would deprive the plea bargaining process of its resource saving advantages or lead the Government to curtail plea-bargaining.) The colloquy itself will further congest courts' dockets and, if the plea entry must be postponed, the process will be fruitlessly delayed. *See In re Johnson*, 398 P.2d at 427.

Practically, such a discussion will pointlessly inhibit prosecution of repeat offenders. Since Iowa has adopted a minority position, no conviction from the majority of Federal Circuits or from any state apart from Minnesota will comply with Iowa's view of the Sixth Amendment and, hence, cannot serve to enhance a later offense.

The decision unnecessarily depreciates the consequences of a settled conviction, one that can no longer be challenged through post-conviction relief or *habeas corpus*. *See Tovar*, 656 N.W.2d at 121 (Carter, J., in dissent) (App. 19-20). The *Tovar* majority imposes a "rigid standard" on district courts, the failure of which minimizes the consequences of a defendant's "solemn confession of guilt in open court" *Id.* The majority's decision fails to conform to *Patterson v. Illinois*' teaching that a "pragmatic approach" should be taken. *Id.* at 122.

Like an arrestee informed of his *Miranda* rights who elects to make an incriminating statement, Felipe Tovar knew the full consequences of proceeding without counsel and entering a guilty plea. *See Patterson*, 487 U.S. at 292-93. The Iowa Supreme Court erred by concluding otherwise when it put an unwarranted, paternalistic gloss on the Sixth Amendment.

CONCLUSION

For all the reasons stated above, this Court should grant *certiorari* to address the Sixth Amendment requirements for a valid waiver of counsel at a guilty plea.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

*DOUGLAS R. MAREK
Deputy Attorney General

DARREL MULLINS
Assistant Attorney General
Hoover Bldg., 2nd Floor
Des Moines, Iowa 50319
515/281-5976

Attorneys for Petitioner
**Counsel of Record*

IN THE SUPREME COURT OF IOWA

No. 168 / 01-1558

Filed January 23, 2003

STATE OF IOWA,

Appellee,

vs.

FELIPE EDGARDO TOVAR,

Appellant.

On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Johnson County, Amanda P. [sic] Potterfield and Larry J. Conmey, Judges.

Defendant seeks further review of court of appeals decision affirming his conviction of operating while intoxicated, third offense, contending prior OWI conviction was improperly used to enhance current charge. **DECISION OF COURT OF APPEALS VACATED; JUDGMENT OF DISTRICT COURT REVERSED AND CASE REMANDED.**

Linda Del Gallo, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel L. Mullins, Assistant Attorney General, J. Patrick White, Johnson County Attorney, and Victoria Dominguez, Assistant County Attorney, for appellee.

TERNUS, JUSTICE.

The defendant, Felipe Tovar, challenges his conviction, after a bench trial, of third-offense operating while intoxicated (OWI). He claims his first OWI conviction should not have been used to enhance the penalty for his current conviction because his prior conviction resulted from an uncounseled guilty plea, and he had not made a valid waiver of his Sixth Amendment right to counsel at the guilty plea proceeding. The district court and the court of appeals rejected Tovar's argument.

Upon our review of the record and the parties' legal arguments, we conclude the defendant's waiver of his right to counsel was not a knowing and intelligent waiver and, therefore, his prior conviction should not have been used for enhancement purposes in the present criminal proceedings. Accordingly, we vacate the court of appeals decision and reverse the district court's judgment of conviction. The case is remanded for further proceedings consistent with this opinion.

I. *Background Proceedings.*

On December 14, 2000, Tovar was charged with OWI, third offense, a class D felony, and driving while license barred, an aggravated misdemeanor. *See* Iowa Code §§ 321J.2, 312.561 (1999). The enhancement of the OWI charge to a third offense was based upon Tovar's two prior convictions for OWI.

Tovar pled not guilty to both of the current charges, and filed a motion to adjudicate law points asserting that his first OWI conviction could not be used to enhance the pending OWI charge. He argued his guilty plea in the

prior proceeding had been uncounseled and there had not been a knowing and intelligent waiver of his right to an attorney. The district court ruled Tovar's waiver of counsel in the prior case was valid, and consequently denied Tovar's motion.

The present case proceeded to trial before the court and Tovar was found guilty of both charges. After sentencing, Tovar appealed his OWI conviction, alleging the district court erred in allowing his first OWI conviction to be used to enhance his current conviction. The court of appeals affirmed the district court's ruling on the defendant's motion to adjudicate law points, and this court granted further review.

II. *Issue on Appeal and Standard of Review.*

The parties agree that a prior conviction resulting from an uncounseled guilty plea for which there was an invalid waiver of counsel may not be used to enhance a subsequent offense where the prior conviction resulted in incarceration. *See Baldasar v. Illinois,* 446 U.S. 222, 226, 100 S. Ct. 1585, 1587, 64 L. Ed. 2d 169, 173-74 (1980) (holding a "prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment"), *overruled in part by Nichols v. United States,* 511 U.S. 738, 749, 114 S. Ct. 1921, 1928, 128 L. Ed. 2d 745, 755 (1994) (holding uncounseled convictions could enhance later offenses provided no incarceration was imposed in the first prosecution); *State v. Cooper,* 343 N.W.2d 485, 486 (Iowa 1984) (holding, where defendant had not been advised of her right to counsel in two prior prosecutions for simple misdemeanor theft, the State was precluded from using the prior convictions to enhance a

third charge of theft to an aggravated misdemeanor). There is also no disagreement that Tovar was not represented by an attorney when he pled guilty to his first OWI charge nor that he expressed the desire to waive his right to counsel at the guilty plea hearing. The dispute in this case centers on whether Tovar's waiver of his right to counsel at the time he pled guilty was valid under the Sixth Amendment.

Although our standard of review for constitutional issues is de novo, *see In re Detention of Williams,* 628 N.W.2d 447, 451 (Iowa 2001), there is no factual dispute in this case. The only issue for our determination is whether the district court correctly determined that the undisputed facts established the defendant had made a knowing and intelligent waiver of his right to counsel at the plea proceeding on his first OWI charge.

III. *Waiver of Right to Counsel in First OWI Prosecution: Undisputed Facts.*

In 1996, Tovar, a college student in Ames, was brought before the Story County district court to plead to a charge of OWI, first offense. At the time, the district court was receiving guilty pleas from several defendants collectively. The judge engaged the defendant in the following discussion. References to the defendant's right to counsel are emphasized.

> The Court: We are on the record in the State of Iowa versus Felipe Tovar, Case No. 23989. This is the time and place set for arraignment on a trial information charging the defendant with operating while intoxicated. Mr. Tovar appears without counsel and *I see, Mr. Tovar, that you waived*

> *application for a court appointed attorney. Did you want to represent yourself at today's hearing?*
>
> Tovar: *Yes, sir.*
>
> . . . .
>
> The Court: And did you want me to read that information to you or did you want to waive the reading?
>
> Tovar: Waive the reading.
>
> The Court: And how do you wish to plead?
>
> Tovar: Guilty.
>
> . . . .
>
> The Court: All right. Gentlemen, if you continue with this desire to plead guilty, there are certain rights that each one of you will be giving up and I now will explain those rights to you. First of all, if you enter a plea of not guilty, you would be entitled to a speedy and a public trial by jury. But, if you plead guilty, you give up your right to have a trial of any kind on your charge.
>
> Do you understand that, Mr. [Tovar]?
>
> Tovar: Yes, sir.
>
> . . . .
>
> The Court: *If you would enter a plea of not guilty, not only would you have a right to a trial, you would have a right to be represented by an attorney at that trial, including a court appointed attorney. That attorney could help you select a jury, question and cross-examine the State's witnesses, present evidence, if any, in your behalf, and make arguments to the judge and jury on your behalf.*

But, if you plead guilty, not only do you give up your right to a trial, you give up your right to be represented by an attorney at that trial.

Do you understand that, Mr. [Tovar]?

Tovar: Yes, sir.

[The court then continued to review the other trial-related rights the defendants would be giving up by pleading guilty.]

The Court: Gentlemen, those are the rights that you will be giving up if you plead guilty. Knowing that, did you still want to plead guilty?

Mr. [Tovar]?

Tovar: Yes, sir.

(Emphasis added.)

After this colloquy, the judge determined whether there was a factual basis for Tovar's guilty plea. He explained to the defendant that there were two elements to his offense: (1) operating a motor vehicle (2) while he was intoxicated. The court then informed the defendant that intoxication could be shown by an alcohol level of .10 or above or by evidence that "the consumption of alcohol has affected your judgment or your reasoning or your faculties or it has caused you to lose control in any manner." Tovar admitted driving a car and, although he did not contest his blood alcohol test results of .194, he denied feeling any effects of the alcohol. The judge concluded there was a factual basis for Tovar's guilty plea and then accepted the plea.

At a later sentencing hearing, Tovar again appeared pro se. The only discussion of Tovar's right to counsel was the following exchange:

> The Court: Mr. Tovar, I note that you are appearing here today without having an attorney present and you waived application for a court-appointed attorney. I am sorry. You applied, but it was denied due to the fact you are dependent upon your parents. Mr. Tovar, did you want to represent yourself at today's hearing or did you want to take some time to hire an attorney to represent you?
>
> Tovar: No, I will represent myself.

The court then conducted essentially the same colloquy used at the guilty plea proceeding and pronounced sentence. Tovar's sentence included a brief stint in the county jail.

IV. *Did Tovar Validly Waive His Sixth Amendment Right to Counsel in His First OWI Prosecution?*

A. *General legal principles.* The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This protection extends to state prosecutions. *State v. Spencer,* 519 N.W.2d 357, 359 (Iowa 1994).

To provide a framework for our consideration of whether this right was accorded to the defendant in his first prosecution for OWI, we quote the observations of the United States Supreme Court on the importance of the right to counsel:

The ". . . right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with [a] crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."

Johnson v. Zerbst, 304 U.S. 458, 463, 58 S. Ct. 1019, 1022, 82 L. Ed. 1461, 1466 (1938) (citation omitted). As this discussion illustrates, the right to counsel is not solely a trial-related right; a defendant is "entitled to the assistance of counsel at all critical stages of the proceedings." *State v. Hindman,* 441 N.W.2d 770, 772 (Iowa 1989); *accord Kirby v. Illinois,* 406 U.S. 682, 688-89, 92 S. Ct. 1877, 1881-82, 32 L. Ed. 2d 411, 417 (1972).

A decision to plead guilty is one of those critical stages. *See Von Moltke v. Gillies,* 332 U.S. 708, 721, 68 S. Ct. 316, 322, 92 L. Ed. 309, 319-20 (1948). Thus, a defendant has the right to an attorney when he enters a guilty plea unless there has been a valid waiver of that right. *Id.* at 720-21, 68 S. Ct. at 321-22, 92 L. Ed. at 319. The desirability of legal advice during plea proceedings exists for misdemeanor cases as well as felony cases: "Counsel is needed [in misdemeanor cases] so that the accused may know precisely what he is doing, so that he is fully aware

of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution." *Argersinger v. Hamlin,* 407 U.S. 25, 33, 92 S. Ct. 2006, 2011, 32 L. Ed. 2d 530, 536 (1972).

Although it is well established a defendant has a right to counsel at a guilty plea hearing on an offense that may result in incarceration, the requirements for a valid waiver of that right are subject to some dispute. At a fundamental level, it is clear that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 748, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747, 756 (1970). What constitutes an adequate awareness of relevant circumstances and likely consequences necessarily depends on the context within which the waiver occurs. *See State v. Cooley,* 608 N.W.2d 9, 15 (Iowa 2000) (stating the "trial court's inquiry may vary depending on the nature of the offense and the background of the accused"); *Hindman,* 441 N.W.2d at 772 ("The degree of inquiry which is required . . . varies with the nature of the offense and the ability of the accused to understand the process.").

In *Patterson v. Illinois,* 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988), the United States Supreme Court, considering the level of inquiry required in postindictment questioning, reasoned:

> [W]e have taken a more pragmatic approach to the waiver question – asking what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage – to determine the scope of the Sixth Amendment right

to counsel, and the type of warnings and procedures that should be required before a waiver of that right will be recognized.

At one end of the spectrum, we have concluded there is no Sixth Amendment right to counsel whatsoever at the postindictment photographic display identification, because this procedure is not one at which the accused "require[s] aid in coping with legal problems or assistance in meeting his adversary." At the other extreme, recognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial. In these extreme cases, and in other[s] that fall between these two poles, we have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel. *An accused's waiver of his right to counsel is "knowing" when he is made aware of these basic facts.*

487 U.S. at 298, 108 S. Ct. at 2397-98, 101 L. Ed. 2d at 275-76 (citations omitted) (emphasis added). The Court stated that in determining whether a waiver of counsel is knowing and intelligent, "the key inquiry" is whether the accused was "made sufficiently aware of his right to have counsel present" at the proceeding *and* "the possible consequences of a decision to forgo the aid of counsel." *Id.* at 292-93, 108 S. Ct. at 2395, 101 L. Ed. 2d at 272. Consistent with the directives of *Patterson,* our court has required at a minimum that the defendant be "admonished

as to the usefulness of an attorney at [the] particular proceeding, and made cognizant of the danger of continuing without counsel." *Cooley,* 608 N.W.2d at 15; *accord State v. Martin,* 608 N.W.2d 445, 450 (Iowa 2000) (stating "[b]efore a trial court accepts the defendant's request to proceed pro se, the court must make the defendant 'aware of the dangers and disadvantages of self-representation' ").

B. *Parties' contentions.* Relying on our decision in *Cooley,* Tovar claims his prior waiver of counsel was not knowing and intelligent. He argues the district court failed to ensure the defendant understood "the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof." *Cooley,* 608 N.W.2d at 15. Tovar also claims the court had a duty to admonish him as to the usefulness of having an attorney and to make him aware of the dangers of proceeding without counsel.

In contrast, the State claims the court was not required to engage the defendant in such a broad discussion "[g]iven the simplicity of the charge he faced and the proceeding in which he was representing himself." The State distinguishes cases in which such a colloquy has been found necessary, noting they involve defendants who have proceeded to trial. *See, e.g., Cooley,* 608 N.W.2d at 15; *Martin,* 608 N.W.2d at 450; *Hindman,* 441 N.W.2d at 772. The State argues that the present case is similar to the postindictment questioning addressed in *Patterson* where the Court concluded that *Miranda* warnings adequately imparted "the dangers and disadvantages of self-representation" to the accused so as to render his waiver of counsel at that stage of the proceedings "knowing and

intelligent." *Patterson,* 487 U.S. at 299, 108 S. Ct. at 2398-99, 101 L. Ed. 2d at 277. The State suggests the guilty plea colloquy required by Iowa Rule of Criminal Procedure 2.8(2)(*b*) performed the same function here that the *Miranda* warnings served in *Patterson.* It cites two cases in support of this proposition: *Stano v. Dugger,* 921 F.2d 1125, 1149 (11th Cir. 1991) and *State v. Cashman,* 491 N.W.2d 462, 463 (S.D. 1992).

C. *Discussion.* Before we evaluate the arguments of the parties, we think it is important to briefly discuss the one prior case in which this court has considered the validity of a waiver of counsel in a guilty-plea setting. In *State v. Moe,* 379 N.W.2d 347 (Iowa 1985), the defendant claimed his current OWI conviction was improperly enhanced based on a prior OWI conviction that resulted from an uncounseled guilty plea. 379 N.W.2d at 348. The record from the defendant's first prosecution for OWI showed the only inquiry concerning the defendant's waiver of counsel was the following question: "Do you understand an attorney would be provided for you at public expense if you are indigent?" *Id.* at 349. Despite the defendant's affirmative response to this question, he contended in his second OWI prosecution that his waiver of counsel was invalid because he had not been advised that his right to counsel extended to the plea proceeding as well as to trial. *Id.* A divided court rejected this contention, relying on the defendant's admission in the second case that he was aware of his right to counsel during the prior prosecution. *Id.* at 350.

Unfortunately, our decision in *Moe* provides little guidance in the present case due to *Moe's* narrow focus on whether the defendant understood the scope of his right to counsel. The court appeared to presume that so long as the

defendant was aware that he was entitled to counsel at the plea proceeding, his decision to forego that right constituted a knowing and intelligent waiver. *Moe* is also of limited value because subsequent to our decision in that case the United States Supreme Court rendered its decision in *Patterson,* making clear that a valid waiver requires more than a simple recognition that one has a right to counsel: the court must make the defendant aware of the "usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Patterson,* 487 U.S. at 298, 108 S. Ct. at 2398, 101 L. Ed. 2d at 276.

Finding no definitive Iowa case to resolve the dispute before us, we turn initially to the cases upon which the State relies: *Stano,* 921 F.2d at 1125, and *Cashman,* 491 N.W.2d at 462. In *Stano,* the Eleventh Circuit Court of Appeals distinguished between the inquiry required for acceptance of a guilty plea and that required for waiver of the right to counsel. 921 F.2d at 1148-49. In the course of its discussion, the court noted that a defendant who pleads guilty need not be admonished of the dangers of proceeding pro se at trial as required by *Faretta v. California,* 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). This observation does not, however, answer the question we face here.

Clearly, under *Patterson,* a waiver-of-counsel inquiry must be tailored to the proceeding at which counsel is waived. Thus, because the dangers of proceeding pro se at a guilty plea proceeding will be different than the dangers of proceeding pro se at a jury trial, the inquiries made at these proceedings will also be different. To simply conclude, as the State suggests, that a *Faretta*-type inquiry is not required at a guilty plea hearing does not answer the

ultimate question of what colloquy *is* required. That question was more directly addressed in the South Dakota case cited by the State.

In *Cashman,* the Supreme Court of South Dakota applied *Patterson* in considering the validity of a waiver of counsel at a guilty plea proceeding. 491 N.W.2d at 463-66. In that case, the defendant claimed his two prior convictions for driving under the influence (DUI) could not be used to enhance his current DUI conviction because the prior convictions resulted from uncounseled guilty pleas for which there had been no valid waivers of counsel. *Id.* at 462. In considering the inquiry needed to ensure that the defendant's waivers were knowing and intelligent, the court contrasted a guilty plea proceeding with the postindictment questioning at issue in *Patterson*:

> The full dangers and disadvantages of self-representation in the entry of a guilty plea might not be as insubstantial as those involved in the post-indictment questioning at issue in *Patterson*. However, they are even more obvious to an accused fully advised of the charges, the elements of the offenses, his constitutional and statutory rights, the maximum possible penalties, and the fact that a plea of guilty would waive these rights.

Id. at 465. The court then reviewed the defendant's prior guilty plea proceedings and concluded valid waivers had occurred:

> During the course of both proceedings, Cashman was advised of his right to counsel and to court appointed counsel if he was indigent. In both proceedings, Cashman indicated his understanding of his right to counsel. Thus, it is beyond

> dispute that Cashman was aware of his right to counsel. Also as in *Patterson,* it is obvious that Cashman had to know "what a lawyer could 'do for him' . . ." during the entry of his plea, namely: advise him to plead not guilty. Clearly, by having been advised of the maximum possible penalties for his offenses, Cashman was aware of the "ultimate adverse consequence . . ." he could suffer by entering an uncounseled guilty plea.

Id. at 465-66 (citations omitted). In essence, the court found the colloquies used to accept the defendant's guilty pleas were also adequate to render his waivers of counsel knowing and intelligent.

We find the *Cashman* court's analysis overly simplistic. To say that an attorney would merely advise a defendant to plead not guilty characterizes a lawyer's role as one-dimensional when in fact it is multi-faceted. A lawyer will know what defenses might be available to the crime charged. A lawyer will also know what questions to ask to determine whether such defenses might be factually viable.

The State minimizes the need for an attorney at an *OWI* guilty plea proceeding, however, based on "the simplicity of the charge." We are not persuaded. Although a layperson can readily understand what it means to drive while intoxicated, he or she will most likely be unaware of the prerequisites for invoking implied consent and the other statutory and constitutional restrictions on police action that might provide a basis for suppression of the evidence of intoxication, which is usually the only meaningful defense available. The United States Supreme Court aptly stated the importance of counsel at this critical stage:

> A waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial. Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered. Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman even though acutely intelligent.

Von Moltke, 332 U.S. at 721, 68 S. Ct. at 322, 92 L. Ed. at 319-20 (citation omitted).

Given these considerations, we think the colloquy undertaken by the court in Tovar's first OWI prosecution was inadequate. We note initially that the discussion between Tovar and the court with respect to the usefulness of counsel at trial did not suffice to advise Tovar of the value of counsel at the plea stage. *See Patterson,* 487 U.S. at 298, 108 S. Ct. at 2398, 101 L. Ed. 2d at 276 (stating the court must make the defendant aware of the "usefulness of counsel to the accused *at the particular proceeding*" (emphasis added)). Not only was there an absence of any dialogue concerning the value of having an attorney when pleading guilty, there was no colloquy with Tovar that alerted him to the dangers and disadvantages of entering a guilty plea without the advice of counsel. Importantly, the court did not warn Tovar that he might have legal defenses to the charge that he, as a layperson, would not recognize. As one court has noted,

> "Substantive criminal law contains many complexities – intent standards, jurisdictional provisions, defenses, and so forth. The defendant may be 'guilty' in a layman's sense, and so be willing to confess, and yet may have a viable defense that he ought to invoke, or may be pleading guilty to the wrong grade of crime."

United States v. Akins, 276 F.3d 1141, 1148 (9th Cir. 2002) (citation omitted).

Under circumstances similar to those presented in the case before us, the Ninth Circuit Court of Appeals held in *Akins* that a waiver of counsel at a guilty plea hearing on a misdemeanor charge was not valid where the defendant had not been admonished of the dangers of self-representation. *Id.* We agree with that court's analysis:

> The purpose of the constitutional right to counsel "is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights." Nowhere is counsel more important than at a plea proceeding. "[A]n intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney."

Id. at 1147 (citations omitted). The court also rejected an argument that the courts would be overburdened if judges were required to warn a defendant of the disadvantages of proceeding without counsel:

> Because a defendant must already appear before the court to enter a guilty plea, a brief exchange regarding the waiver of counsel should not significantly increase the burden on the courts. . . . It is the duty of the courts to safeguard the fundamental right to liberty by ensuring that a

> defendant's waiver of the right to counsel is knowing and intelligent.

Id. at 1148-49.

V. *Summary and Disposition.*

In summary, a defendant such as Tovar who chooses to plead guilty without the assistance of an attorney must be advised of the usefulness of an attorney and the dangers of self-representation in order to make a knowing and intelligent waiver of his right to counsel. In fulfilling this requirement in a case such as the one before us, the court is not expected to assume the role of an attorney, discussing with the defendant the various defenses that might be available. Rather, the trial judge need only advise the defendant generally that there are defenses to criminal charges that may not be known by laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked. The defendant should be admonished that by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty. In addition, the court must ensure the defendant understands the nature of the charges against him and the range of allowable punishments. Only with this information can the defendant make an informed and intelligent decision whether to forgo the assistance of counsel given the risks and possible outcomes.

Here, the State's only proof of the knowing and intelligent nature of Tovar's waiver of counsel in his first OWI prosecution is the court's plea colloquy with the defendant. Because the district court did not engage Tovar in any

meaningful discussion concerning his waiver of counsel at the plea proceeding, we cannot conclude that Tovar understood the usefulness of counsel at that stage or knew the dangers and disadvantages of proceeding pro se. As a result, the record does not support a finding that Tovar's waiver of counsel was made knowingly and intelligently. Therefore, it was error for the district court to allow the State to use Tovar's prior conviction of first-offense OWI to enhance the current charge to a third-offense OWI.

We vacate the court of appeals decision affirming the defendant's conviction. We also reverse the district court's judgment of conviction and remand for entry of judgment without consideration of the defendant's prior OWI conviction based on his uncounseled guilty plea.

DECISION OF COURT OF APPEALS VACATED; JUDGMENT OF DISTRICT COURT REVERSED AND CASE REMANDED.

All justices concur except Carter, J. who dissents. Neuman and Streit, JJ. join the dissent.

CARTER, Justice (dissenting).

I respectfully dissent.

The result reached in the opinion of the court is an extreme measure that unnecessarily depreciates the consequences of a criminal conviction based on defendant's solemn confession of guilt in open court. At the time of his guilty plea, defendant was fully advised of his right to counsel and elected to forego being represented. Defendant's earlier OWI conviction is still on his record and will remain that way because the statute of limitations for

seeking postconviction relief has now run. To permit a collateral attack on the earlier conviction in the present litigation should only be permitted on a convincing showing that defendant was not guilty with regard to the first OWI conviction or that some compelling federal authority requires that it be disregarded for sentencing enhancement purposes. Neither of these circumstances exists in the present case.

The opinion of the court correctly suggests that a pragmatic approach should be taken in determining whether a waiver of right to counsel is knowingly and voluntarily made. That is the teaching of *Patterson v. Illinois,* 487 U.S. 285, 298, 108 S. Ct. 2389, 2397-98, 101 L. Ed. 2d 261, 275-76 (1988). But, the standard that the majority of this court applies is not pragmatic in any sense. It is a rigid standard which requires that the party seeking to waive counsel must, in all instances, be expressly advised of the dangers that exist in proceeding without counsel.

Prior to the Court's decision in *Patterson,* we approached the problem of determining whether a waiver of counsel was knowing and voluntary solely on the basis of whether the accused had been properly advised of the right to counsel. *State v. Moe,* 379 N.W.2d 347, 348 (Iowa 1985). The *Patterson* case has injected another consideration, which is whether the accused is aware of the consequences of proceeding without counsel. However, nothing in *Patterson* suggests that a waiver of counsel is never voluntary unless an express admonition concerning the potential adverse effect of that decision is given the accused. Quite the contrary is true. *Patterson* recognized that the accused's knowledge of the consequences of proceeding without counsel could be inferred from his

having been given *Miranda* warnings. *Patterson,* 487 U.S. at 293-94, 108 S. Ct. at 2395-96, 101 L. Ed. 2d at 272-73.

In the present case, the State argues persuasively that Tovar was sufficiently made aware of the adverse consequences that might befall him from the district court's guilty-plea admonition. In addition to advising Tovar concerning his waiver of the constitutional rights described in the opinion of the court, he was also advised concerning both the maximum and mandatory minimum sentences that would befall him upon a plea of guilty. He was therefore made fully aware of the penal consequences that might befall him if he went forward without counsel and pleaded guilty.

It is true that there are other adverse consequences that might arise from proceeding without counsel. A search for these consequences leads the court into speculation concerning unidentified potential defenses that an able lawyer might have advanced. I submit that it is not reasonable to ignore the consequences of a voluntary guilty plea based on that type of speculation. As the Supreme Court observed in *Patterson*:

> If petitioner [after having been advised of his right to counsel in a *Miranda* warning] nonetheless lacked "a full and complete appreciation of all of the consequences flowing" from this waiver, it does not defeat the State's showing that the information it provided to him satisfied the constitutional minimum.

Id. (quoting *Oregon v. Elstad,* 470 U.S. 298, 316-17, 105 S. Ct. 1285, 1296-97, 84 L. Ed. 2d 222, 236-37 (1985)). The showing of the State in *Patterson* did not include evidence that an express admonition of the dangers that existed in

proceeding without counsel had been given the accused. Nevertheless, the Court found that the waiver was knowingly and voluntarily made. I would reach the same result in the present case. I would affirm the judgment of the district court.

Neuman and Streit, JJ., join this dissent.

IN THE COURT OF APPEALS OF IOWA

No. 2-330/01-1558
Filed June 19, 2002

STATE OF IOWA,

Plaintiff-Appellee,

vs.

FELIPE EDGARDO TOVAR,

Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Amanda P. [sic] Potterfield and Larry J. Conmey, Judges.

Felipe Tovar appeals from the judgment and sentence following his conviction for operating while intoxicated, third offense, and driving while license barred in violation of Iowa Code sections 321J.2 and 321.561 (1999). **AFFIRMED**.

Linda Del Gallo, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel L. Mullins, Assistant Attorney General, J. Patrick White, County Attorney, and Victoria Dominguez, Assistant County Attorney, for appellee.

Considered by SACKETT, C.J., and HUITINK and HECHT, JJ.

HECHT, J.

Felipe Tovar appeals from the judgment and sentence following his conviction for operating while intoxicated, third offense, and driving while license barred in violation of Iowa Code sections 321J.2 and 321.561 (1999). We affirm.

I. Factual Background and Proceedings. On the evening of December 7, 2000, Iowa City Police Officer Steve Kivi observed Felipe Tovar driving without his headlights illuminated. When Kivi stopped the vehicle, Tovar handed him an Illinois driver's license that belonged to his passenger. Another officer arrived shortly thereafter and both detected a strong odor of alcohol and signs of intoxication. The officers administered a preliminary breath test, which indicated a blood alcohol concentration of .148. Tovar was arrested and taken to the Iowa City police station where he declined to provide a breath sample.

The State charged Tovar with operating while intoxicated (OWI), third offense,[1] and driving while license barred.[2] Tovar pled not guilty to both charges. Tovar filed a motion for adjudication of law points regarding a 1996 OWI conviction entered upon a guilty plea. In his motion, Tovar contended the 1996 conviction could not be used to enhance his OWI charge because his plea was uncounseled. At Tovar's 1996 arraignment, the following colloquy took place:

> THE COURT: Mr. Tovar appears without counsel and I see, Mr. Tovar, that you waived application

[1] Tovar pled guilty to operating while intoxicated in 1996 and 1998.

[2] Tovar was barred from driving until May 20, 2003.

> for a court appointed attorney. Did you want to represent yourself at today's hearing?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And are you charged in your true and correct name?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And did you want me to read that information to you or did you want to waive the reading?
>
> THE DEFENDANT: Waive the reading.
>
> THE COURT: And how do you wish to plead?
>
> THE DEFENDANT: Guilty.
>
> * * *
>
> THE COURT: Mr. Tovar, your age?
>
> THE DEFENDANT: Twenty-one.
>
> THE COURT: Your education?
>
> THE DEFENDANT: Currently in college.
>
> THE COURT: So you, of course, read and write the English language?
>
> THE DEFENDANT: Yes.
>
> * * *
>
> THE COURT: . . . if you continue with this desire to plead guilty, there are certain rights that each one of you will be giving up and I now will explain those rights to you. First of all, if you enter a plea of not guilty, you would be entitled to a speedy and a public trial by jury. But, if you plead guilty, you give up your right to have a

trial of any kind on your charge. Do you understand that . . . Mr. Tovar?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: If you would enter a plea of not guilty, not only would you have a right to a trial, you would have a right to be represented by an attorney at that trial, including a court appointed attorney. That attorney could help you select a jury, question and cross-examine the State's witnesses, present evidence, if any, in your behalf, and make arguments to the judge and jury on your behalf. But, if you plead guilty, not only do you give up your right to a trial, you give up your right to be represented by an attorney at that trial. Do you understand that . . . Mr. Tovar?

THE DEFENDANT: Yes, sir.

* * *

THE COURT: Mr. Tovar . . . you have been charged with operating while intoxicated. That charge carries a maximum penalty of up to a year in jail and up to a $1000.00 fine and the mandatory minimum fine (sic) of two days in jail and a $500.00 fine. Do you understand that, Mr. Tovar?

THE DEFENDANT: Yes, sir.

During the 1996 plea proceedings, the following relevant exchange, regarding waiver of counsel, took place:

THE COURT: Mr. Tovar, I note that you are appearing here today without having an attorney present and you waived application for a court appointed attorney. I am sorry. You applied, but it was denied due to the fact you are dependent upon your parents. Mr. Tovar, did you want to represent yourself at today's hearing or did you want to take some time to hire an attorney to represent you?

THE DEFENDANT: No, I will represent myself.

THE COURT: Mr. Tovar, has anyone promised you anything or threatened you in any way in order to convince you to proceed here today without having an attorney present?

THE DEFENDANT: No, sir.

Tovar's motion for adjudication of law point asserted his waiver of counsel in 1996 was not knowing, intelligent, and voluntary because the district court failed to address the following five matters during the 1996 colloquy: (1) the possible defenses to the charge, (2) circumstances of mitigation, (3) that OWI is an enhanced penalty offense, (4) an admonishment of the usefulness of an attorney, and (5) the danger of proceeding without an attorney. The district court found Tovar's waiver of counsel was voluntary, knowing, and intelligent and denied the relief requested in the motion. The court held a stipulated bench trial and found Tovar guilty on both charges. Tovar appeals.

II. Standard of Review. We review the ruling of the district court on the defendant's motion to adjudicate law points for the correction of legal error. *State v. Mann,* 463 N.W.2d 883, 883 (Iowa 1990). To the extent Tovar's claims raise constitutional issues, our review is de novo. *State v. Moe,* 379 N.W.2d 347, 350 (Iowa 1985).

III. MERITS. Tovar contends the district court erred in overruling his motion to adjudicate law points. Tovar argues his current conviction cannot be enhanced from OWI second to OWI third because his waiver of counsel in his 1996 plea was not knowingly and voluntarily made.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to self-representation. *State v. Martin,* 608 N.W.2d 445, 449-50 (Iowa 2000). "Before the right to self-representation attaches, the defendant must voluntarily elect to proceed without counsel by 'knowingly and intelligently' waiving his or her Sixth Amendment right to counsel." *Id.* at 450 (quoting *Faretta v. California,* 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 582 (1975)). A valid waiver requires an understanding of the nature of the charges, the statutory offenses included within them, the range of allowable defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. *State v. Cooley,* 608 N.W.2d 9, 15 (Iowa 2000) (citations omitted). Furthermore, a criminal defendant must be "admonished as to the usefulness of an attorney at the particular proceeding, and made cognizant of the danger of continuing without counsel." *Id.* (citations omitted).

The State concedes the district court failed to address the five items listed in Tovar's motion; however, the State contends a full admonition of the dangers of self-representation is not required when a defendant enters a guilty plea to a criminal charge. The State argues the authorities cited by Tovar, including *Martin* and *Cooley,*

concern self-representation *at trial* and are not applicable to self-representation in a guilty plea.

In support of this contention the State relies primarily on *State v. Cashman,* 491 N.W.2d 462, 462 (S.D. 1992), where the defendant challenged the enhancement of his sentence for driving under the influence contending "his two prior convictions failed to reflect a knowing and intelligent waiver of his right to counsel prior to entry of the uncounseled guilty pleas on which the convictions were based." *Id.* In *Cashman,* the South Dakota Supreme Court determined a *Faretta*-type inquiry is not required for waiver of counsel at every stage of the criminal process. *Id.* at 464. The court noted the significant differences between a defendant considering proceeding *pro se* at trial and a defendant "making a decision to waive counsel in the earlier stages of the criminal process." *Id.*

The court held the appropriate test for waiver prior to a guilty plea proceeding is "whether the accused was made sufficiently aware of his right to have counsel present; and whether the accused was made sufficiently aware of the possible consequences of a decision to forego the aid of counsel." *Id.* at 465 (citing *Patterson v. Illinois,* 487 U.S. 285, 292-93, 108 S. Ct. 2389, 2395, 101 L. Ed. 2d 261, 272 (1988)). The court concluded all the requirements were met for a valid waiver of counsel prior to the entry of Cashman's guilty pleas because he was advised of his right to counsel, had indicated his understanding of that right, and was advised of the maximum possible penalties for his offense. *Cashman,* 491 N.W.2d at 466. We find this reasoning persuasive and adopt it as our own.

Applying the test in *Cashman,* we conclude Tovar validly waived his right to counsel prior to entry of the

1996 uncounseled guilty plea. Tovar was advised of his right to counsel and made sufficiently aware of what counsel could do for him at trial. *See Moe,* 379 N.W.2d at 350 (holding defendant's waiver of counsel knowing and voluntary when he testified at a later proceeding that he "understood before he pleaded guilty that an attorney would be provided for him" and was advised of his right to jury trial). *See also State v. Hindman,* 441 N.W.2d 770, 772 (Iowa 1989) ("Where the offense is readily understood by laypersons and the penalty is not unduly severe, the duty of inquiry which is imposed upon the court is only that which is required to assure an awareness of right to counsel and a willingness to proceed without counsel in the face of such awareness"). Furthermore, Tovar was informed of the ultimate adverse consequences he could suffer as he was advised of the maximum possible penalties for the offense.

Because there was a valid waiver of counsel in obtaining Tovar's 1996 conviction, his present conviction was appropriately enhanced. *See Moe,* 379 N.W.2d at 349 (holding "uncounseled prior convictions may be used for enhancement purposes in subsequent proceedings when the defendant has validly waived the right to counsel in the earlier proceedings"). Accordingly, we conclude the district court did not err in ruling on Tovar's motion to adjudicate law points.

AFFIRMED.

IN THE SUPREME COURT OF IOWA

No. 01-1558

Johnson County No. OWCR057355

ORDER

(Filed Sep. 20, 2002)

STATE OF IOWA,
Plaintiff-Appellee,

vs.

FELIPE EDGARDO TOVAR,
Defendant-Appellant.

After consideration by this court en banc, further review of the above-captioned case is granted.

The issues presented for review will be submitted to this court during the week beginning November 4, 2002. The parties will be notified of the date and time of submission about one month in advance.

The court will consider the previously-filed papers. No supplemental briefs will be required.

The parties will not be heard in oral argument.

Dated this 20th day of September, 2002.

THE SUPREME COURT OF IOWA

By /s/ Louis A. Lavorato
Louis A. Lavorato,
Chief Justice

Copies to:

State Appellate Defender
Attn: Theresa R. Wilson
Lucas bldg.
LOCAL

Attorney General
Attn: Darrel Mullins
Hoover Bldg.
LOCAL

VERDICTS AND ORDERS

Filed May 25, 2001

IN THE IOWA DISTRICT COURT IN
AND FOR JOHNSON COUNTY

STATE OF IOWA, Plaintiff, vs. FELIPE EDGARDO TOVAR, Defendant.	)	No. OWCR057355 VERDICTS AND ORDERS (Filed May 25, 2001)

Defendant appeared in open court this date with his counsel, Emily Hughes. The State was represented by Assistant County Attorney Karen Egerton.

Defendant waived his right to a jury trial, without resistance by the State. The Court accepts Defendant's waiver of jury trial. The parties proceeded to a stipulated trial on the basis of the Minutes of Testimony filed December 14, 2000, and previously filed motions and orders. At the request of the parties, the Court takes judicial notice of the two pages of Minutes of Testimony; Judge Conmey's order dated May 14, 2001; the Motion for Adjudication of Law Points filed March 22, 2001, as well as the Memorandum in Support of the Motion for Adjudication of Law Points filed May 8, 2001.

The Court finds the evidence proves beyond a reasonable doubt that Defendant is guilty of the two crimes charged in the Trial Information, that is, (Count I) Operating While Intoxicated as a Third Offender, in violation of Iowa Code Section 321J.2, and (Count II) Driving While Barred, in violation of Iowa Code Section 321.561.

Time for sentencing is set for the 13th day of July, 2001, at 9:00 a.m. A presentence investigation is to be prepared by a representative of the Sixth Judicial District Department of Correctional Services. The original report and two copies shall be filed with the office of the Clerk of Court seven days prior to the sentencing date.

The attorney for the Defendant, if court appointed, shall promptly prepare her statement for services rendered to the Defendant, current to date filed.

IT IS FURTHER ORDERED that the County Attorney shall promptly prepare a statement of pecuniary damages to victims of Defendant's criminal activity. The Clerk of Court shall promptly prepare a statement of Court-appointed attorney fees or expenses of a public defender, if any, and court costs in connection with this matter. Both statements shall be provided to the presentence investigator.

At the time of sentencing, restitution will be ordered in the amount set out in the statement of pecuniary damages filed unless the Defendant gives notice of any objections thereto in writing prior to sentencing.

The Defendant's bond shall remain as previously set.

Clerk to furnish a copy of this order to counsel of record.

Dated this 24th day of May, 2001.

/s/ Amanda Potterfield
AMANDA POTTERFIELD, Judge
Sixth Judicial District of Iowa

IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

STATE OF IOWA, Plaintiff, vs. FELIPE TOVAR, Defendant.	)	OWCR 057355 **RULING** (Filed May 14, 2001)

Hearing on the Application for Adjudication of Law Points filed by Defendant and the Resistance thereto came before the Court on May 9, 2001. The parties filed a Joint Stipulation on May 8, 2001, stating that State's Exhibit A, a transcript from the Story County Court dated November 18, 1996, and State's Exhibit B, a transcript from the Story County Court dated December 30, 1996, accurately reflect the colloquy between the Court and Defendant Tovar. The parties further waived their right to oral argument in this matter. Upon review of the file, the Court finds that said Application should be denied.

I.R.Civ.P. 116 states that upon application of a party the court must "separately hear and determine any point of law raised in any pleading which goes to the whole or any material part of the case." The Iowa Supreme Court has previously approved the use of adjudication of law points in criminal cases under I.R.Crim.P. 10(2), which states in part, "any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion." *See State v. Wilt,* 333 N.W.2d 457, 460 (Iowa 1983). Such an adjudication is proper only when the legal questions presented

arise from uncontroverted pleadings or stipulated facts. *See State v. Hawkins,* 356 N.W.2d 197 (Iowa 1984).

The question of whether or not Defendant's current charge may be enhanced to a Third Offense, based on defendant Tovar's voluntary, knowing, and intelligent waiver of his right to counsel in Story County OWCR023989, is purely a legal question, which is appropriate for resolution in a motion to adjudicate law points. Defendant asserts his waiver is invalid as the Court failed to make him aware of the dangers and disadvantages of self-representation. Defendant cites *State v. Rater,* 568 N.W.2d 655, 660 (Iowa 1997).

A defendant has a Sixth Amendment right to legal representation. *State v. Stephenson,* 608 N.W.2d 778, 782 (Iowa 2000), *cites omitted*. In accordance with this right, a criminal defendant may proceed without an attorney and conduct his own defense. *Id.* However, before a trial court honors the defendant's request to waive the right to counsel, the court must determine the defendant's election is voluntary, knowing, and intelligent. *Id.* In making this determination, courts are required to engage the defendant in a colloquy sufficient to apprise the defendant of the dangers and disadvantages inherent in self-representation. *Id.*

The degree of inquiry necessary to assure a valid waiver varies with the nature of the offense and the ability of the defendant to understand the process. *Id.*; *State v. Rater*, 568 N.W.2d at 660, *citing State v. Hindman,* 441 N.W.2d 770, 772 (Iowa 1989). Where the offense is readily understood by laypersons and the penalty is not unduly severe, the duty of inquiry which is imposed upon the court is only that which is required to assure an awareness of

[the] right to counsel and a willingness to proceed without counsel in the face of such awareness. *Hindman,* supra. The Court has specifically found operating a motor vehicle while under the influence of alcohol is an offense readily understood by laypersons. *Rater,* 568 N.W.2d at 660, *citing Hindman,* 441 N.W.2d at 772.

Pursuant to the precedent set forth in *Rater* and *Hindman,* the Court finds Defendant's waiver of counsel in Story County OWCR023989 was voluntary, knowing, and intelligent. Therefore, the relief requested by Defendant in his Application for Adjudication of Law Points should be denied.

RULING

IT IS THEREFORE ORDERED that the relief requested in Defendant's Application for Adjudication of Law points is DENIED.

Clerk to Notify.

/s/ Larry J. Conmey
LARRY J. CONMEY, JUDGE
SIXTH JUDICIAL DISTRICT
OF IOWA

TRIAL INFORMATION

Filed December 14, 2000

IN THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY

THE
STATE OF IOWA
339610000

vs.

FELIPE EDGARDO TOVAR
2402 Bartelt Road #2B
Iowa City, IA 52240

TRIAL INFORMATION

No. OWCR057355

Iowa Code Sec. 321J.2

DOB: 01-26-75

COMES NOW *M. Victoria Dominguez*, as Prosecuting Attorney for Johnson County, Iowa, and in the name and by the authority of the State of Iowa, accuses the said *Felipe Edgardo Tovar* of the following crimes:

Count I

Operating While Under the Influence of Alcohol or a Drug or While Having an Alcohol Concentration of 0.10 or More – Third Offense

committed as follows: The said *Felipe Edgardo Tovar* on or about the *7th day of December, 2000*, in the County of Johnson, State of Iowa, did *operate a motor vehicle while under the influence of an alcoholic beverage or other drug or a combination of such substances*, in violation of *Section 321L2* of the 1999 Iowa Code, *said Defendant having previously been convicted of the crime of Operating while*

Intoxicated in Cause No. OWCR023989, in the Story County District Court, State of Iowa, on or about the 30th of December, 1996; again, said Defendant having previously been convicted of the crime of Operating while Intoxicated in Cause No. OWCR046170, in the Johnson County District Court, State of Iowa, on or about March 16, 1998.

Count II:

Driving while Barred

committed as follows: The said *Felipe Edgardo Tovar*, on or about the *7th day of December, 2000*, in the County of Johnson, State of Iowa, did *operate a motor vehicle upon a public roadway while his driving privilege or license was barred, to-wit: Defendant's driving privilege was barred under Section 321.560 of the Iowa Code on May 20, 1998 and remained barred until May 20, 2003*, in violation of *Section 321.561*, of the 1999 Code of Iowa.

A TRUE INFORMATION

/s/ M. Victoria Dominguez

M. VICTORIA DOMINGUEZ
339610023
PROSECUTING ATTORNEY

APPROVAL AND ORDER FOR ARRAIGNMENT

This information and the Minutes of Evidence accompanying it have been examined by me and found to contain sufficient evidence, if unexplained to warrant a conviction by a trial jury, the filing of this information is approved by me on this 14th day of December, 2000.

ARRAIGNMENT IS SCHEDULED TO BE HELD AT THE JOHNSON COUNTY COURTHOUSE ON December 21, 2000, at 1:00 P.M.

If you require the assistance of auxiliary aids or services to participate in court because of a disability, immediately call your district ADA coordinator at 1-319-398-3920, ext. 200. (If you are hearing impaired, call Relay Iowa TTY at 1-800-735-2942).

✓ Previously ordered conditions of release shall continue.

___ Defendant is released on personal recognizance.

___ Bond is set in the amount of $_____.

___ Bond may be unsecured.

___ Bond must be cash or secured in the full amount.

___ 10% cash may be posted.

___ Clerk of Court shall issue a summons for Defendant to appear.

___ Clerk of Court shall issue an arrest warrant.

___ Defendant shall report to the Johnson County Sheriff's Office to undergo booking procedures on or before the date set for arraignment

___ Defendant's personal appearance for arraignment is required.

___ Defendant may, prior to the time set for his arraignment, file herein a written arraignment and plea of not guilty.

Failure to appear for arraignment as ordered or, if authorized, to file timely a written arraignment, will result in forfeiture of the appearance bond on file.

However, bond forfeiture will not necessarily result in dismissal of the charge.

/s/ Douglas S. Russell
JUDGE